

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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Ex parte WAYNE GERALD MORLEY and BEGONA VARONA

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Appeal No. 2006-1478  
Application No. 09/970,014

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ON BRIEF

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Before GARRIS, PAK and WALTZ, Administrative Patent Judges.

GARRIS, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal which involves claims 1-18.

The subject matter on appeal relates to a composition with two visible layers and comprising a liquid fat phase, a water phase having dissolved therein 0.01 - 1% by weight of carrageenan, and wherein the composition gives upon shaking by hand an oil-in-water emulsion which is stable for a period of up to 30 seconds to 360 minutes and the composition reverts thereafter back into a system with two visible layers. Further

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details regarding this appealed subject matter are set forth in representative independent claim 1 which reads as follows:

1. A composition with two visible layers and comprising (based on the total composition):

- a liquid fat phase in an amount of 20 - 80 wt %
- a water phase in an amount of 80 - 20 wt % with dissolved therein a thickener,
- particulates, pastes, powders, extracts, or other physical entity obtainable from the fruit of plants of the genus *Capsicum* in an amount of at least 0.01 % (dry weight %/ total weight),

wherein said thickener comprises 0.01 - 1 % (dry weight %/total weight) of carrageenan, and further wherein such composition gives upon shaking by hand an oil-in-water emulsion which is stable for a period of up to 30 seconds to 360 minutes, the composition reverts thereafter back into a system with two visible layers.

The references set forth below are relied upon by the examiner as evidence of obviousness:

Swisher	3,615,702	Oct. 26, 1971
Errass et al. (Errass)	4,497,843	Feb. 5, 1985

Lowe, "Emulsions," Experimental Cookery, pp. 266-75 (2<sup>nd</sup> Ed., John Wiley & Sons, Inc., New York, 1937).

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All of the appealed claims are rejected under 35 U.S.C. § 103(a) as being unpatentable over Swisher in view of Lowe and Errass.<sup>1</sup>

We refer to the brief and reply brief as well as to the answer for a complete discussion of the opposing viewpoints expressed by the appellants and by the examiner concerning the above noted rejection.

#### OPINION

For the reasons which follow, we will sustain this rejection.

The appellants and the examiner agree that appealed claim 1 distinguishes from Swisher by virtue of the limitation regarding carrageenan. The composition disclosed by Swisher (i.e., salad dressing in the form of an oil-in-water emulsion) contains no carrageenan. Similarly, the appellants and the examiner agree that the Swisher patent contains no disclosure at all regarding the particular stability feature recited in claim 1. That is,

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<sup>1</sup>The here rejected claims have not been separately argued with any reasonable specificity in the manner required by 37 CFR § 41.37(c)(1)(vii) (September 13, 2004). Therefore, in assessing the merits of the rejection before us, we will focus on independent claim 1 (i.e., the broadest claim on appeal) with which all other claims will stand or fall.

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while patentee discloses hand shaking his composition in order to produce an emulsion (e.g., see lines 34-41 in column 1 and lines 3-15 in column 5), Swisher provides no disclosure as to whether this emulsion possesses the duration and the reversion characteristics required by the claim under consideration.

Like Swisher, Errass discloses a composition in the form of an oil-in-water emulsion suitable for use as salad dressing. According to Errass, "the various clear salad dressings with oil which are available on the market suffer from the serious disadvantage that on standing, an oil layer forms after a short time, that is the two phases separate" and accordingly "[p]roducts of this type have to be homogenised by shaking before use" (column 1, lines 23-28). The Errass patent further discloses that the aforementioned disadvantage is eliminated with patentee's oil-in-water emulsion which is characterized by the presence of two different stabilizers, namely, *Carraghenan iota* and *Gummi arabicum* (e.g., see lines 29-58 in column 1). The resulting oil-in-water emulsion is described as being "quite stable for at least several months" (column 2, lines 24-25).

In light of these respective reference teachings, it would have been obvious for one with ordinary skill in this art to

provide the salad dressing composition of Swisher with a stabilizing agent, namely, *Carraghenan iota* motivated by the desire to obtain emulsion stability in accordance with the teachings of Errass. In this regard, the appellants state that Swisher "appears to teach away from the present invention since emulsifiers . . . are desired" (brief, page 9).<sup>2</sup> To the contrary, Swisher's teaching (e.g., see lines 24-34 in column 2 and the compositions of the first Table in column 5) that his salad dressing compositions optionally include emulsifiers (i.e., stabilizers; see footnote 2) militates in favor of providing this composition with the carrageenan stabilizer taught by Errass.

As for the here claimed stability duration and reversion characteristics, the record before us contains multiple sources of evidence that the characteristics of emulsion stability and its duration versus reversion of the emulsion into separate phases were known in the prior art under consideration. For example, as previously indicated, Errass describes a previous

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<sup>2</sup>As a matter of clarification, the terms emulsifier, stabilizer and emulsifying agent are synonymous and refer to a substance which keeps the drops of an emulsion dispersed thereby giving permanence or stability to the emulsion system. See the paragraph bridging pages 266-67 of the Lowe reference.

salad dressing with a degree of emulsion stability prior to separation (i.e., reversion) which patentee considered to be insufficient (again see lines 23-28 in column 1). To rectify this perceived insufficiency, Errass provided his salad dressing composition with a stability duration of "several months" (again see lines 24-25 in column 2). Similarly, Lowe discloses a salad dressing emulsion having stability for only a few minutes and thus referred to as a temporary emulsion (see the last full paragraph on page 266). Finally, the prior art described by the appellants on pages 1-3 of their specification includes salad dressing emulsions having a stability prior to reversion/phase separation which ranged in duration from minutes to months.

Under these circumstances, it is our determination that salad dressings having emulsion stability ranging from a few minutes (e.g., see Lowe) to several months (e.g., see Errass) were known in the prior art as acceptable. This leads us to conclude that it would have been obvious for an artisan, in providing Swisher's salad dressing composition with a carrageenan stabilizer of the type taught by Errass, to employ a quantity of stabilizer sufficient to achieve an acceptable stability duration such as a few minutes (e.g., again see Lowe) or more (e.g., a few

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hours). It is appropriate to here emphasize that, generally speaking, it would have been obvious to determine an appropriate value for an art-recognized, result-effective parameter, such as emulsifier amount, to thereby achieve a desirable, acceptable result. See In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ2d 1934, 1936-37 (CCPA 1976); In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 219 (CCPA 1980); In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955).

The composition resulting from the above discussed combination of prior art teachings would satisfy all aspects of the appealed claim 1 composition including the stability and reversion characteristics recited in the last clause of the claim. For the reasons set forth above, there is no persuasive merit in the appellants' argument that the applied references would not have suggested such characteristics. Indeed, this argument appears to conflict with clear record evidence that salad dressing compositions of the prior art included stability periods (i.e., before reverting back into a system with two

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separate layers or phases) which fall within the appellants' claimed range. We hereby sustain, therefore, the Section 103 rejection of all appealed claims as being unpatentable over Swisher in view of Lowe and Errass.

The decision of the examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

BRADLEY R. GARRIS	)	
Administrative Patent Judge	)	
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	)	
	)	BOARD OF PATENT
CHUNG K. PAK	)	APPEALS AND
Administrative Patent Judge	)	INTERFERENCES
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THOMAS A. WALTZ	)	
Administrative Patent Judge	)	

BRG/hh



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